

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SCOTT RAY ASHER et al.,

Plaintiffs,

VS.

PACIFIC LEGENDS WEST CONDOMINIUM
ASSOCIATION et al.,

Defendants.

2:08-cv-00914-RCJ-NJK

ORDER

This case arises out of an alleged arrest without probable cause. Pending before the Court is a Motion for Attorney's Fees (ECF No. 128). For the reasons given herein, the Court denies the motion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Scott Ray Asher and Kimberly Dawn Asher filed a six-count Complaint in state court on July 1, 2008. (*See* Compl., July 1, 2008, ECF No. 1, at 5). Plaintiffs alleged that during a press conference held by Defendants Karen Weber and Tammy Ernst concerning a mail room burglary, they identified Scott Asher to the press as the burglar, based only upon their having seen a poor-quality surveillance video of the burglary, and that the responding officers arrested him and searched his apartment without probable cause. (*See id.* ¶¶ 11–17).

Defendants removed. Three groups of Defendants separately moved for summary judgment: (1) Las Vegas Metropolitan Police Department (“LVMPD”) and Officers Orth, McGhie and Destito (collectively, “LVMPD Defendants”); (2) Weber and Ernst; and (3) Pacific

1 Legends West Condominium Association (“Pacific Legends”). The Court granted LVMPD
2 Defendant’s motion in all respects. The Court granted Ernst and Weber’s and Pacific Legends’
3 motions, except as to the defamation claim as to statements made to persons other than the
4 police. Before appeal, Plaintiffs stipulated to dismissal with prejudice as against Ernst, Weber,
5 and Pacific Legends. The Court of Appeals affirmed except as to the fifth claim for a Fourth
6 Amendment violation against the individual Officers pursuant to 42 U.S.C. § 1983, which claim
7 it remanded for trial. A jury rendered a verdict for Defendants. Defendants have moved for
8 attorney’s fees.

9 **II. LEGAL STANDARDS**

10 **A. 42 U.S.C. § 1988**

11 Any “prevailing party” in a § 1983 case may move for reasonable attorney’s fees as part
12 of its costs. 42 U.S.C. §§ 1988(b), 2000e–5(k). A § 1983 defendant, however, may only recover
13 fees directly traceable to the defense of claims that are “frivolous.” *Harris v. Maricopa Cnty.*
14 *Superior Court*, 631 F.3d 963, 971 (9th Cir. 2011). “A case may be deemed frivolous only when
15 the ‘result is obvious or the . . . arguments of error are wholly without merit.’” *Karam v. City of*
16 *Burbank*, 352 F.3d 1188, 1195 (9th Cir. 2003) (quoting *McConnell v. Critchlow*, 661 F.2d 116,
17 118 (9th Cir. 1981) (citation omitted)) (alteration in original). Costs other than attorney’s fees
18 should be awarded to a prevailing party upon motion. Fed. R. Civ. P. 54(d)(1).

19 **B. Nevada Revised Statutes Section**

20 This statute is analogous to Federal Rule 11, although the statute applies only against
21 parties, not against attorneys:

22 In addition to the cases where an allowance is authorized by specific statute,
23 the court may make an allowance of attorney’s fees to a prevailing party . . . [w]ithout
24 regard to the recovery sought, when the court finds that the claim, counterclaim,
25 cross-claim or third-party complaint or defense of the opposing party was brought or
maintained without reasonable ground or to harass the prevailing party. The court
shall liberally construe the provisions of this paragraph in favor of awarding
attorney's fees in all appropriate situations. It is the intent of the Legislature that the

1 court award attorney's fees pursuant to this paragraph and impose sanctions pursuant
2 to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to
3 punish for and deter frivolous or vexatious claims and defenses because such claims
4 and defenses overburden limited judicial resources, hinder the timely resolution of
5 meritorious claims and increase the costs of engaging in business and providing
6 professional services to the public.

7 Nev. Rev. Stat. § 18.010(2), (2)(b). Federal Rule 11 (which imposes penalties on attorneys or
8 pro se parties) does not conflict with NRS section 18.010 (which imposes penalties on
9 represented parties). *See Chamberlain v. Giampapa*, 210 F.3d 154, 160 n.5 (3d Cir. 2000) (citing
10 *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996)). Defendants
11 may therefore maintain the present motion under NRS section 18.010 against Plaintiffs, but not
12 against Plaintiffs' counsel.

13 **III. ANALYSIS**

14 The Court denies fees. First, it is clear that the Fourth Amendment claims were not
15 frivolous so as to support fees under § 1988, as the Court of Appeals reversed summary judgment
16 and remanded for trial. Second, although the Court of Appeals affirmed summary judgment
17 against the state law claims, the Court finds that they were not frivolous or groundless under the
18 state statute. Fees are permitted under section NRS 18.010 where "the claim . . . was brought or
19 maintained without reasonable ground or to harass" Nev. Rev. Stat. § 18.010(2)(b). The
20 Court finds that the state law claims were not brought without reasonable ground. The failed
21 state law claims did not meaningfully enlarge the proceedings, and the omission of those claims
22 in the Complaint would not have prevented the expenses incurred defending the non-frivolous
23 federal claims.

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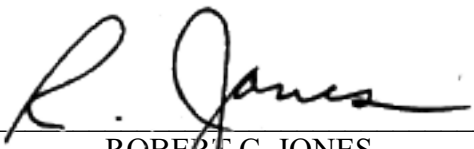
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CONCLUSION

IT IS HEREBY ORDERED that the Motion for Attorney's Fees (ECF No. 128) is
DENIED.

IT IS SO ORDERED.

Dated this 6th day of March, 2013.



ROBERT C. JONES
United States District Judge